U.S. Department of Homeland Security
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Washington, DC 20529

U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: OCT 15 2007
SRC 06 246 52631

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

for Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The decision of the director will be withdrawn and the petition will be remanded for further action and consideration.

The petitioner is a real estate rental business. It seeks to employ the beneficiary permanently in the United States as a senior financial analyst pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. As required by statute, the petition was accompanied by certification from the Department of Labor. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and denied the petition accordingly.

On appeal, counsel submits tax documents for 2006 that were not previously available. While these documents overcome the director's basis of denial, the petition is not approvable based on the record. Specifically, the record lacks evidence that the beneficiary is eligible for the classification sought. Thus, we must remand the matter so that the director can request the following evidence: the beneficiary's degree, an evaluation of that degree and signed or sealed evidence of the beneficiary's experience.

The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the ETA Form 9089 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 C.F.R. § 204.5(d). Here, the ETA Form 9089 was accepted for processing on April 5, 2006. The proffered wage as stated on the ETA Form 9089 is $74,152 annually. On Part K of the ETA Form 9089, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner.

On the petition, the petitioner claimed to have an establishment date on December 23, 2003, undisclosed gross annual income and net income and four employees. In support of the petition, the petitioner submitted only the alien employment certification.

Because the director deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on September 5, 2006,

the director requested additional evidence pertinent to that ability. In accordance with 8 C.F.R. § 204.5(g)(2), the director specifically requested that the petitioner provide copies of annual reports, federal tax returns, or audited financial statements to demonstrate its continuing ability to pay the proffered wage beginning on the priority date.

In response, the petitioner submitted the 2005 Internal Revenue Service (IRS) Form 1040 U.S. Individual Income Tax Return of the petitioner's sole member showing an adjusted gross loss of $659,661. Schedule E, which provides income or loss from rental real estate and royalties, reflects income after expenses of $21. The petitioner requests that the $76,293 depreciation be considered available to pay the proffered wage.

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and, on November 28, 2006, denied the petition.

On appeal, counsel asserts that the petitioner's 2006 tax returns are now available and demonstrate the petitioner's ability to pay the proffered wage. The petitioner submits its 2006 IRS 1065 U.S. Return of Partnership Income. The petitioner shows no income or deductions on page 1. Rather, Form 8825, Rental Real Estate Income and Expenses of a Partnership or an S Corporation, shows net rental real estate income of $117,921.

Citizenship and Immigration Services (CIS) will examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Federal courts have recognized the reliance on federal income tax returns as a valid basis for determining a petitioner's ability to pay the proffered wage. *See Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986). *See also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532, 536 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080, 1083 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647, 650 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient. In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income.

The petitioner's 2006 net rental real estate income is sufficient to cover the proffered wage. Thus, the petitioner has demonstrated the ability to pay the proffered wage as of April 5, 2006, the priority date in this matter.

For the reasons discussed above, the petitioner has overcome the director's basis of denial. A second issue, not raised by the director, is the beneficiary's eligibility for the classification sought. As stated above, the petitioner seeks to classify the beneficiary as a member of the professions holding an advanced degree pursuant to section 203(b)(2) of the Act.

An advanced degree is a United States academic or professional degree or a foreign equivalent degree above the baccalaureate level. 8 C.F.R. § 204.5(k)(2). The regulation further states: "A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree." *Id.*

The ETA Form 9089, Part H, lines 4 and 6, reflect that the job requires at least a baccalaureate degree in any field and five years of experience in the job offered, senior financial analyst. On Part J, the beneficiary indicated that he earned a baccalaureate in Food Science and Technology in 1999 from Seoul National University. On Part K, the beneficiary indicated that he worked as senior financial analyst for Gillette Korea Limited from August 20, 1999 through November 4, 2004.

In the request for additional evidence, the director requested evidence of the beneficiary's experience, but not his degree or an evaluation of his degree. In response, the petitioner submitted an unsigned Certificate of Employment that bears no official or corporate seal. The certificate purports to confirm the beneficiary's employment with Gillette from August 20, 1999 through November 4, 2004.

The record lacks the beneficiary's degree and an evaluation of that degree. Moreover, as the Certificate of Employment is not signed and does not bear an official or corporate seal, it has little evidentiary value.

Therefore, this matter will be remanded for consideration of whether the beneficiary is eligible for the classification sought, which requires that he possess at least a U.S. baccalaureate or foreign equivalent degree plus five years of experience. 8 C.F.R. § 204.5(k)(2)(definition of advanced degree). The director *shall* request the absent evidence discussed in the preceding paragraph before rendering a new decision. As always in these proceedings, the burden of proof rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The director's decision is withdrawn. The petition is remanded to the director for further action in accordance with the foregoing and entry of a new decision which, if adverse to the petitioner, is to be certified to the Administrative Appeals Office for review.